IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ROME DIVISION

JOSHUA PARNELL, **Plaintiff,**	)	
v.	)	**Civil Action File No.:**
WESTERN SKY FINANCIAL, LLC, d/b/a Western Sky Funding, Western Sky, WesternSky.com; MARTIN A. ("Butch") WEBB; & CASHCALL, INC.,	)	**4:14-cv-00024-HLM**
Defendants.	)	

CASHCALL, INC.'S MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR *BLINCO* STAY PENDING APPEAL

Defendant CashCall, Inc. ("CashCall") is contemporaneously filing a notice of appeal under 9 U.S.C. § 16 from this Court's order ("Order") denying its Renewed Motion to Compel Arbitration and Dismiss or Stay Action. (Dkt. 25). CashCall now respectfully moves the Court for a stay of all proceedings in this case during the pendency of that appeal.

Under *Blinco v. Green Tree Servicing, LLC*, a district court must stay all proceedings before it upon motion following the filing of a non-frivolous appeal from an order denying arbitration. 366 F.3d 1249, 1251 (11th Cir. 2004). CashCall's appeal of the Order, which holds that the arbitration agreement is void due to

unconscionability and the unavailability of the forum, is not frivolous. In *Inetianbor v. CashCall, Inc.*, Judge Cohn held that CashCall's arguments to enforce a similar arbitration clause were not frivolous and thus granted a *Blinco* stay, even though he had previously denied CashCall's motion to compel arbitration. *See Inetianbor v. CashCall, Inc.*, No. 0:13-cv-60066-JIC, slip op. at 2 (S.D. Fla. Sept. 20, 2013).

Like the district court in *Inetianbor*, this Court has held that the arbitration clause is not enforceable. But for all the reasons given in CashCall's briefing, and given the strong precedent in favor of enforcing arbitration clauses, CashCall's arguments that the arbitration clause is enforceable were not frivolous in *Inetianbor*, and are not frivolous here. Under *Blinco*, therefore, CashCall respectfully requests that the Court stay further proceedings while CashCall pursues its appeal.

I. BACKGROUND

Joshua Parnell ("Plaintiff") sued CashCall, Western Sky Financial, LLC, and Martin A. Webb in the Superior Court of Whitfield County on December 6, 2013.[1] (Dkt. 1-3) After a proper removal to this Court, and after Plaintiff's amended complaint mooted CashCall's original motions, CashCall filed renewed motions to

[1] Western Sky Financial, LLC and Martin A. Webb have not been served with the Complaint or Amended Complaint, and in any event, are not subject to personal jurisdiction in this Court. Consequently, the current motion is not filed on their behalf and should not be construed as an appearance in this litigation by either.

dismiss this case or to compel arbitration. (Dkt. 18-19.) On April 28, 2014, the Court denied both motions.[2] The Court concluded that the arbitration provision ("Arbitration Clause") in Plaintiff's loan contract ("Loan Agreement") was not enforceable because the arbitral forum is unavailable and thus the Arbitration Clause is unconscionable. (Order at 74-78.)

II. ARGUMENT

A. The Eleventh Circuit Requires District Courts To Issue A Stay Pending Any Non-Frivolous Appeal From The Denial Of An Arbitration Motion.

The Eleventh Circuit has held that "[w]hen a litigant files a motion to stay litigation in the district court pending an appeal from the denial of a motion to compel arbitration, the district court should stay the litigation so long as the appeal is non-frivolous." *Blinco*, 366 F.3d at 1253. "[O]ne of the principal benefits of arbitration [is] avoiding the high costs and time involved in judicial dispute resolution" and "[i]f the court of appeals reverses and orders the dispute arbitrated, then the costs of the litigation in the district court incurred during appellate review have been wasted and the parties must begin again in arbitration." *See id*. at 1251. Thus, "[w]hen a non-frivolous appeal involves the denial of a motion to compel arbitration, it makes little

[2] This memorandum addresses only the Court's denial of CashCall's Renewed Motion to Compel Arbitration. CashCall is simultaneously filing a motion under 28 U.S.C. § 1292(b), in which CashCall requests this Court to certify its denial of the motion to dismiss for an interlocutory appeal.

sense for the litigation to continue in the district court while the appeal is pending," and the proceeding in the district court should be stayed. *See id*. at 1253. Under *Blinco*, CashCall requests a stay of the district court proceedings for the duration of its appeal.

B. CashCall Is Entitled To A *Blinco* Stay Because CashCall's Appeal Is Not Frivolous.

CashCall's appeal is not frivolous. An appeal is "frivolous" if it is "entirely without merit." *See Dawes-Ordonez v. Forman*, 418 F. App'x 819, 821 (11th Cir. 2011). On the other hand, an argument "is not frivolous if it is 'colorable,' and a claim is 'colorable' if 'there is some *possible* validity' to it.'" *Baron v. Best Buy Co*., 79 F. Supp. 2d 1350, 1354 (S.D. Fla. 1999) (citation omitted; emphasis in original). The "non-frivolous" standard imposes only a "limited burden" on the party seeking a stay. *See TGB Marine, LLC v. Midnight Express Power Boats, Inc.*, 2008 WL 4649009, at *1 (S.D. Fla. Oct. 20, 2008). CashCall acknowledges this Court's decision that the Loan Agreement's arbitration clause is not enforceable. This Court concluded that the arbitral forum designated by the arbitration clause is not available and that its unavailability required the Court to find the clause unenforceable. CashCall's appeal of that decision is not frivolous for several reasons.

First, CashCall has a good faith argument that the Arbitration Clause's delegation provision prohibits the Court from evaluating the validity or enforceability

of the Arbitration Clause. (Dkt. 19-1 at 11-12; Dkt. 24 at 1-3.) The Arbitration Clause delegates the authority to decide those questions to the arbitrator, and under clear Supreme Court precedent that delegation provision is enforceable. (*Id.*) Thus, one basis for appeal that is patently not frivolous is the question of whether this Court adequately considered that delegation provision and the applicable authority governing its enforceability.

Second, the Arbitration Clause allows the parties to use either the AAA or JAMS to administer the arbitration, and there is no dispute those fora are available. This Court appears to have concluded that because the Loan Agreement says only that the AAA or JAMS will be the "administrator" of the arbitration, the forum is unavailable because it does not provide who the arbitrator must be. (Order at 76.) But an arbitration clause is enforceable even if it does not designate in advance who the parties will use as the arbitrator. (Dkt. 24 at 8 (quoting *Blinco v. Green Tree Servicing* LLC, 400 F.3d 1308, 1312 (11th Cir. 2005) (enforcing arbitration clause that did "not specify the identity of the arbitrator")).) Thus, CashCall respectfully reads the arbitration clause to permit the parties to use arbitrators provided by the AAA or JAMS, or any other arbitral organization the parties can agree upon. This is not a baseless contention.

Third, even if the Arbitration Clause were ambiguous as to whether it requires the use of a tribal arbitrator, the FAA requires courts to resolve that ambiguity in favor of arbitration. This is consistent with the Congressionally-established presumption in favor of arbitration, and the FAA's requirement that "the courts . . . rigorously enforce agreements to arbitrate." *Brandon, Jones, Sandall, Zeide, Kohn, Chalal & Musso, P.A. v. Medpartners, Inc.*, 312 F. 3d 1349, 1357-58 (11th Cir. 2002) (quotations omitted), *abrogated on other grounds*, *Ray Haluch Gravel Co. v. Central Pension Fund*, 134 S. Ct. 773 (2014); *see also Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-26 (1985); *MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, 947 (11th Cir. 1999). "[T]he Supreme Court . . . [has] made clear that the strong federal preference for arbitration of disputes expressed by Congress in the [FAA] must be enforced where possible." *Musnick v. King Motor Co. of Ft. Lauderdale*, 325 F.3d 1255, 1258 (11th Cir. 2003) (citing *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79 (2000)). Thus, "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration," including when "constru[ing] . . . the contract language itself." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). At most, this Court identified an ambiguity in the contract as to whether it requires a tribal arbitrator. But the FAA calls for resolving that ambiguity *in favor* of arbitration.

Fourth, CashCall has demonstrated that even if the arbitral fora were unavailable, the arbitration clause still must be enforced because the parties can petition a court to appoint a substitute arbitrator under FAA Section 5. (Dkt. 19-1 at 24-25; Dkt. 24 at 8.) This Court held that it could not enforce the arbitration clause because the arbitral fora were an "integral part" of the arbitration clause. (Order at 73.) But there is no "integral part" exception to the obligation that courts appoint a substitute forum under FAA Section 5. (*See* Dkt. 19-1 at 25 (quoting *Green v. U.S. Cash Advance Ill., LLC*, 724 F.3d 787, 792 (7th Cir. 2013).) Further, the very fact that Plaintiff has fought to avoid arbitration in accord with the Arbitration Clause demonstrates that he did not view the designated arbitral forum as "integral." Indeed, the Eleventh Circuit has rejected a similar argument in the past. *See Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000) ("[T]here is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate. Brown's argument that the arbitration agreement is void because the NAF was unavailable must fail").

In *Inetianbor*, which this Court referenced in its Order (*see* Order at 73-75), the Eleventh Circuit currently is considering (a) whether the FAA allows a court to void an arbitration clause due to the unavailability of arbitral forum because that forum was an "integral part" of the agreement; and (b) whether the arbitral forum there was

integral to that agreement, which also involved a Western Sky loan serviced by CashCall.[3] *See Inetianbor v. CashCall, Inc.*, No. 13-13822 (11th Cir. Aug. 23, 2013). The Eleventh Circuit has tentatively calendared *Inetianbor* for oral argument in July 2014, which suggests that the Circuit believes that CashCall's "appeal is [not] frivolous" or that "the dispositive issue or issues have [not] been authoritatively decided." Fed. R. App. P. 34(a)(2). Thus, the very fact the Eleventh Circuit has scheduled the *Inetianbor* appeal for oral argument further shows that the issues before this Court are not frivolous. Likewise, at the district court, Judge Cohn granted CashCall a *Blinco* stay despite his skepticism of the ultimate merits of CashCall's arguments. *See Inetianbor*, No. 0:13-cv-60066-JIC, slip op. at 2 (S.D. Fla. Sept. 20, 2013).

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In sum, even if "th[e] Court believes its decision on the motion to compel arbitration remains correct," it should still find that CashCall "has met its limited burden to stay this action pending resolution of its appeal of this Court's order denying . . . arbitration." *See TGB Marine*, 2008 WL 4649009, at *1.

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[3] As CashCall has demonstrated to the Eleventh Circuit in its briefing in *Inetianbor*, the statements in *Brown* suggesting a court can void an arbitration clause if the designated forum is both unavailable and integral to that agreement were *dicta*. The proper conclusion, which the Seventh Circuit recently made clear in *Green*, is that the FAA requires courts to appoint a substitute arbitrator if the designated forum fails, integral or not.

III. CONCLUSION

WHEREFORE, for the reasons set forth above, CashCall respectfully requests that the Court grant this motion and enter a stay of all proceedings in this Court pending the resolution of CashCall's appeal of the Order.

Respectfully submitted this 9th day of May, 2014.

By: */s/ William J. Holley, II*

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CERTIFICATE OF COMPLIANCE

In compliance with N.D. Ga. R. 7.1D, I certify that the foregoing memorandum has been prepared in conformity with N.D. Ga. R. 5.1. This memorandum was prepared with Times New Roman (14 point) type, with a top margin of one and one-half (1 ½) inches and a left margin of one (1) inch. This memorandum is proportionately spaced, and is no longer than 25 pages.

/s/ William J. Holley, II
William J. Holley, II

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically submitted the foregoing **MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR *BLINCO* STAY PENDING APPEAL** to the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record, each of whom is a registered participant in the Court's electronic notice and filing system:

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This 9th day of May, 2014.

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